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No. 96-787

In The

Supreme Court of the United States

October Term, 1996

JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC. and STEVEN LEWIS,

Petitioners,

vs.

HALL & PHILLIPS and UNITED STATES *ex rel.* ALNOOR VIRANI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners Jerry M. Lewis Truck Parts & Equipment, Inc. and Steven Lewis ("Lewis") seek review of the Court of Appeals for the Ninth Circuit's decision affirming the denial of Lewis' motion for reconsideration of the district court's award of statutory attorneys' fees to Hall & Phillips ("HP").[1]

Lewis first launched his attack on HP in 1992, when HP moved for an award of attorneys' fees following the successful resolution of this case. The suit — brought by HP's clients Alnoor Virani and the non-profit organization Taxpayers Against Fraud ("TAF") pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* — alleged that Lewis had defrauded the United States by selling it military parts from unauthorized and undisclosed foreign sources, as well as parts of inferior quality. (CR 1, ER 1 - 11).[2] The government joined the suit pursuant to 31 U.S.C. § 3730(b)(4) and, with HP's assistance, eventually reached a settlement requiring Lewis to pay the government $4.25 million dollars. (*See* CR 173, ER 173). The government agreed to pay 20% of the settlement, or $850,000, to Virani, pursuant to 31 U.S.C. § 3730(d)(1).[3]

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1. Lewis' petition for rehearing of the Ninth Circuit's decision was denied. *See* Order Denying Petitions for Rehearing, August 21, 1996, attached hereto as Appendix A. In addition, the Ninth Circuit denied Lewis' motion to stay issuance of the mandate pending Lewis' petition to the Supreme Court for a writ of certiorari. *See* Order Denying Motion to Stay Issuance of Mandate, September 9, 1996, attached hereto as Appendix B.

2. Citations beginning with "CR" are to the Excerpts of Record filed by Lewis with the Ninth Circuit. Consistent with Lewis' citation in the appellate court, "CR" refers to the number assigned a document on the district court's docket sheet, and "ER" refers to the page number on the same document in Lewis' Excerpts of Record.

3. Prior to the settlement, TAF had withdrawn as a plaintiff. (*See* SER (Cont'd)

HP's motion for attorneys' fees was supported by 65 pages of detailed, contemporaneous time records which described over two thousand hours of legal work performed by the firm in this case, as well as declarations from the government regarding the substantial contributions of HP's attorneys. (SER Tab 129, at 23-24; SER Tab 142; SER Tab 150).

In response, Lewis challenged the reasonableness of the fees requested by HP, and attacked the firm's fee agreements with Virani and TAF as overreaching and unconscionable.[4] Lewis also argued that HP had misled both Virani and the court. The district court rejected each and every argument made by Lewis, awarding the full amount of attorneys' fees requested by the law firm. (CR 173, ER 175-180). The court agreed with the government that "Hall & Phillips' contribution [to the favorable settlement] was substantial." (CR 173, ER 175). In addition, the court found that the relationship among HP and its clients was legally irrelevant to the determination of a reasonable fee. (CR 173, ER 175-76). Although the court noted that it could, *sua sponte*, review the retainer agreements for reasonableness, it chose not to do so. (CR 173, ER 176, n.1). Lewis appealed

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(Cont'd)
Tab 92) ("SER" refers to the Supplemental Excerpts of Record filed by HP with the Ninth Circuit. The "Tab" numbers refer to the numbers on the district court's docket sheet.) Nevertheless, Virani had agreed to share his reward with TAF in return for TAF 's continuing agreement to fund the expenses of the lawsuit, and to pay a contingency fee to HP. (SER Tab 134, at 34-38).

4. Those agreements provided that Virani would share any amounts received by the government in this case with his co-plaintiff TAF. In return, TAF would fund the litigation and pay a contingency fee — out of TAF's share only — to counsel in the case. TAF would use any remaining amounts to help other *qui tam* plaintiffs pursue their cases. (SER Tab 134, at 34-36). In addition, Virani assigned HP any award of statutory attorneys' fees that was made in the case. (SER Tab 134, at 41).

the award, but deliberately abandoned the appeal by not filing an opening brief. (SER Tab 188).

Shortly after the attorneys' fee judgment was entered, Lewis initiated discussions resulting in an agreement whereby Lewis would pay the full amount of the attorneys' fee judgment over time and with interest. (SER Tab 198, at 180-88). However, Virani refused to sign the agreement, initially asserting that his signature was not necessary. (SER Tab 225, at 207-08). Later, Virani unexpectedly asserted that he *personally* was entitled to the *entire* amount of statutory attorneys' fees awarded by the court, as well as to the entire 20% of the government's settlement proceeds. (*See* CR 222, ER 318-19). Virani's position was a complete disavowal of both his retainer agreement with Hall & Phillips, in which he explicitly assigned the statutory fee award to Hall & Phillips, (SER Tab 134, at 41), and of his agreement with TAF, in which he agreed to share any payment he received from the proceeds of the case with TAF. (SER Tab 134, at 35).

Virani's primary argument was that Hall & Phillips had failed to inform him that the firm would receive a contingency fee payment from TAF, in addition to the award of statutory attorneys' fees from Lewis. However, substantial evidence demonstrated that Virani was fully informed regarding the terms of the fee agreements and had consented to those terms. (*See* SER Tab 134, at 34-43 (the agreements Virani signed); SER Tab 198, at 195-96 (letter from attorney John Phillips to Virani describing the contingency fee allocation); SER Tab 225, at 210 (letter from attorney Ann Carlson describing the contingency fee allocation); *see also* SER Tab 224, at 206-07; SER Tab 198, at 178-79 and 192-93 (declarations by three HP attorneys affirming that Virani never questioned or complained about the fee arrangements until long after the case was successfully concluded)).

Nevertheless, Lewis seized upon Virani's dispute with HP as an opportunity to renew his complaints regarding HP to the district court, and to seek reconsideration of the court's final judgment awarding attorneys' fees. After filing an initial motion "requesting guidance" as to whom it should pay the statutory fees, Lewis then requested that the entire award be vacated and either eliminated completely or reduced based, once again, on HP's purportedly fraudulent and unethical conduct. (SER Tab 226, at 212). Lewis also requested sanctions against HP and attorney John Phillips based on the allegation that they had defrauded the court. (*Id.*). The only "evidence" ever produced by Lewis of the alleged "fraud" were HP's fee agreements, and the fact that Virani *alleged* he had not been fully informed of those fee agreements. In response HP submitted evidence (a portion of which is cited in the preceding paragraph) demonstrating that both Virani's and Lewis' allegations were false.

On August 25, 1995, the district court reiterated its earlier holding that HP's relationship with Virani was irrelevant to the determination of a "reasonable fee" and, accordingly, denied Lewis' request that the fee award be reconsidered. (Lewis' Petition for Writ of Certiorari (Lew. Pet.") at App. 37). In addition, the district court found no factual basis for sanctions, thus rejecting Lewis' argument that HP defrauded the court.[5] (*Id.*). Lewis did not appeal the denial of sanctions.

Lewis did, however, appeal the district court's refusal to reconsider the earlier award of fees and, in his appellate brief,

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5. The district court also held that the attorneys' fee award should be paid directly to Virani, rather than to HP, upon whose labor the award was based. (Lew. Pet., at App. 34). HP appealed that portion of the district court's decision and the Ninth Circuit reversed, finding that the award of fees must be paid to the attorneys who earned the fees, rather than to the litigant. (*Id.*, at App. 11).

continued his unwarranted attack on the ethics of HP's attorneys. The Ninth Circuit found that the district court should have at least considered the allegations of ethical impropriety when determining the reasonableness of the fee award. (*Id.*, at App. 12). However, upon its examination of the "facts," (as opposed to Lewis' rhetoric), the Court of Appeals concluded that the most Lewis could argue was that there were improprieties in the formation of the attorney-client relationship between and HP and Virani. Under clearly established state law, however, these alleged improprieties, even if proven, would not necessitate a reduction in the award of attorneys' fees which was clearly based on the actual and substantial legal work performed by the attorneys in the case. (*Id.*, at App. 12-14).

Lewis now seeks another forum in which to launch his completely false allegations of misconduct.

SUMMARY OF ARGUMENT

This is not an appropriate case for review by the Supreme Court. First, Lewis has failed to present an appropriate question for review. (*See* Lew. Pet. at i). The issue in this case is not whether a "reasonable" attorneys' fee award can properly include fees incurred in the furtherance of fraud or ethical improprieties, nor is the issue whether the Ninth Circuit failed to consider whether the fee award in this case included fees earned in furtherance of a fraud. To the contrary, the Ninth Circuit found that Lewis' allegations of ethical misconduct *were relevant* to the determination of the reasonable fee that Lewis must pay under the False Claims Act. (Lew. Pet., at App. 12). Although the Ninth Circuit declined to resolve all of the factual disputes between the parties, it did examine the substantial evidence in the district court record and determined that, "under the facts of this case," there was no basis for reducing the amount of attorneys' fees awarded by the district court. (*Id.*, at App. 12-14).

Lewis' quarrel is not with the legal standard applied by the Ninth Circuit — that defendants must only pay a "reasonable" fee — but with the way the Court of Appeals applied that standard to the facts of this case. This case does not rest on a difficult or important question of law. Rather, it rests on an intensely factual determination which was carefully — and correctly — made by the Ninth Circuit, despite Lewis' earnest attempts to mislead the court with false and distorted descriptions of the record. Nothing will be gained by this Court expending its precious resources reviewing that factual record again.

The waste of judicial resources would be particularly acute in this case, given Lewis' strong propensity towards misstatements of the factual record. Throughout the extensive district court and appellate proceedings in this case, in an effort to impugn his successful opposing counsel, Lewis repeatedly asserted facts which were either demonstrably false or egregiously distorted. Lewis' petition to this Court is no exception.

Indeed, the questions for review presented by Lewis are based on an implied fact — that HP was awarded statutory attorneys' fees for time spent committing fraud — which is simply false. Despite having numerous opportunities to do so, Lewis has never presented a single piece of evidence in support of that assertion, and it was properly rejected by both the district court and the Ninth Circuit. Both courts had before them detailed records documenting over 2000 hours of attorney time spent by HP litigating the case on Virani's behalf, and both courts found the hours worked to be legitimate and reasonable.

Finally, Lewis has attempted to manufacture a conflict between the circuits where none exists. The Ninth Circuit's decision in this case is perfectly consistent with the Sixth

Circuit's decision in *United States ex rel. Taxpayers Against Fraud v. General Electric Company*, 41 F.3d 1032 (6th Cir. 1994). The courts in both this case and *GE* found certain allegations of ethical improprieties to be relevant to the courts' determination of what constituted a reasonable statutory attorneys' fee. In this case there was a substantial factual record for the Court of Appeals to review regarding those allegations. After reviewing the factual record, the Ninth Circuit found no basis for reconsidering the award of attorneys' fees. The court in *GE*, however, had no factual record to consider and, accordingly, remanded the case to the district court for additional fact finding. There is no conflict between the circuits.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS FAILED TO PRESENT A PROPER ISSUE FOR REVIEW BY THIS COURT.

The questions presented for review in Lewis' petition are based on a fundamental misunderstanding of the decision rendered by the Ninth Circuit in this case. Lewis asserts that both the district court and the Ninth Circuit "rejected Lewis' argument that the award of reasonable attorneys' fees under the False Claims Act could not as a matter of law include any amount with reflected fees incurred [in the furtherance of fraud or ethical improprieties]." (Lew. Pet., at 8). What Lewis fails to acknowledge is that the Court of Appeals specifically found that the allegations of "fraud and unethical conduct" *were* relevant to the reasonableness of the fees. (*See* Lew. Pet., at App. 12 (finding that the district court erred in failing to address Lewis' argument)).

The Ninth Circuit itself examined the allegations and the

evidence in the record and determined that, at bottom, Lewis' allegations pertained not to the legitimacy of the fees charged, but to the relationship between HP and Virani and the initial negotiation of the fee arrangements. The Court of Appeals made a factual determination that there was no conflict of interest in the attorney/client relationship and that, under clearly established California law, the attorneys' were therefore entitled to, at a minimum, a *quantum meruit* fee. The Court of Appeals made a further factual determination that Lewis was only being required to pay a *quantum meruit,* or "reasonable," fee. (*Id.*, at App. 12-14).

Accordingly, the only potential issue for review is whether, in applying the "reasonableness" standard to the award of attorneys' fees in this case, the Ninth Circuit erred in its factual findings. Lewis has not presented this issue for review and, even if he had, it would not be an appropriate use of the writ of certiorari. *See* Sup. Ct. Rule 10 (a petition for certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

In addition, Lewis' "Questions Presented" are based on an implied fact — that the statutory fee award includes attorneys' fees for time spent by HP perpetrating a fraud — that is demonstrably false. First, the district court determined that HP had not defrauded the court when it denied Lewis' motion for sanctions. (Lew. Pet., at App. 37). The motion was explicitly based on Lewis' unfounded assertion that HP defrauded the court. (SER Tab 226, at 212). Since Lewis did not appeal the denial of sanctions, he is precluded from reasserting his "fraud on the court" theory.

Moreover, Lewis has never presented a shred of evidence that the attorneys' fee award included fees for time spent by HP doing anything other than legitimate legal work on the case.

Although all of HP's billing records — comprising 65 pages of detailed time entries — were before both the district court and the Court of Appeals, Lewis was never able to point to a single entry that was supposedly improper. Both courts examined the facts in the record, and determined that the hours billed were reasonable.

Thus, Lewis has failed to present a proper question for review. The petition should be denied on that basis alone.

II.

THE NINTH CIRCUIT PROPERLY DETERMINED THAT THE AWARD OF ATTORNEYS' FEES AGAINST LEWIS WAS REASONABLE.

Contrary to Lewis' assertion, the Ninth Circuit did not simply "presume" that the statutory award of attorneys' fees was reasonable. (*See* Lew. Pet., at 13). Rather, the Court of Appeals made a factual determination that the fees awarded were reasonable based on the extensive record before the court, and based on a close examination of the allegations put forward by Lewis.

The record in this case included HP's original fee application, which was comprised of extremely detailed, contemporaneously prepared records — down to fifteen minute increments — of the over 2000 hours spent by HP attorneys working on the case. (SER Tab 150). These time records reflect the time HP spent legitimately litigating and resolving the matter. The record included every fee agreement among HP, Virani and TAF. (SER Tabs 134 and 169). The record included declarations regarding the nature of HP's relationship with TAF, and regarding TAF's role in the lawsuit. (SER Tabs 198 and 228). The record also included evidence, including explicit written

communications between HP and Virani, which demonstrated that Virani was fully advised of all of the fee arrangements in this case. (SER Tabs 134, 198 and 225).

Thus, it was not in a vacuum that the Ninth Circuit determined that there is no hint in this case that

> there was any conflict of interest whatever. Nor was there any suggestion that HP did not perform valuable services for Virani or that anything is amiss in the calculation of the reasonable amount of fees for those services.

(Lew. Pet., at App. 13). The Ninth Circuit appropriately found that Lewis' arguments amounted to "no more than an assertion that HP handled its fee arrangement in a way that might have the taint of some impropriety." (*Id.*, at App. 14). While the Court of Appeals declined to decide whether, in fact, any impropriety was present, it correctly concluded that even if there were some impropriety, HP would "still be entitled to recover the reasonable value of its services." (*Id.*). The court further determined that, based on its review of the record, Lewis had only been required to pay a "reasonable fee." (*Id.*, at App. 13-14). Lewis' contention that it has been required to reimburse HP for time it spent committing fraud or ethical violations is therefore wholly unsupported by the facts.

III.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

Lewis asserts that the Ninth Circuit's decision in this case is in direct conflict with the decision of the Sixth Circuit in *United States ex rel. Taxpayers Against Fraud v. General Electric Company,* 41 F.3d 1032 (6th Cir. 1994). Lewis' assertion of a

conflict is based on his fundamental misunderstanding of the Ninth Circuit's holding, as discussed above. In its decision, the Ninth Circuit specifically considered Lewis' allegations of fraud and unethical conduct, and the facts upon which they were based, and found them to be legally insufficient to require a reduction in the fee. Similarly, in *GE*, the court found that certain allegations of ethical improprieties were relevant to the determination of a reasonable attorneys' fee. Unlike this case, however, the court in *GE* lacked a sufficient factual record to resolve the allegations, and therefore remanded for additional fact finding. *See* 41 F.3d at 1044.

The Sixth Circuit also directed the district court to entertain facts regarding TAF's role in the lawsuit, whether TAF's participation raised any ethical issues, and the validity of the fee agreements. *Id.* With one exception,[6] however, these latter inquiries were not considered to be relevant to the determination of a reasonable fee. Rather, the Court of Appeals held that if the fee agreements failed for some reason, the court should "make appropriate findings modifying the division of the bounty [*i.e.*, the relators' share] and the contingency fees among the parties." *Id.* at 1045. In this case, the division of the relators' share and the contingency fee was not before the Ninth Circuit.

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6. The Court of Appeals did indicate that the district court's findings regarding TAF might impact "*TAF's portion* of the attorneys' fee award." 41 F.3d at 1044 (emphasis added). Here of course, TAF was not awarded statutory attorneys' fees, so this aspect of the *GE* decision is inapposite.

IV.

LEWIS' REPEATED MISSTATEMENTS OF THE RECORD ALONE WARRANT DENIAL OF THE PETITION.

In addition to the many reasons already asserted, Lewis' petition for a writ of certiorari should be denied because acceptance of the case will require the Court to expend its limited resources parsing through the numerous and egregious falsities presented repeatedly by Lewis.

While responding to each of the misstatements in this brief is unnecessary, given the many other deficiencies in Lewis' petition, HP feels compelled to at least point out some of the more serious untruths.

For example, Lewis falsely states that HP never disclosed to Virani its relationship with TAF, or TAF's agreement to pay a contingency fee (out of TAF's share) to HP. (Lew. Pet., at 4). In fact, Virani's agreement with TAF specifically provided that TAF could pay a contingency fee to counsel, out of its share. (SER Tab 34, at 35-36). Further, once the case was settled, HP advised Virani in writing, on two separate occasions, of the precise amount that HP, Virani and TAF would receive from the proceeds of the case pursuant to the fee agreements. (SER Tab 198, at 195-96; SER Tab 225, at 210).

Lewis falsely states that TAF played no role in advancing this case. (Lew. Pet., at 14). In fact, the uncontroverted evidence demonstrates that TAF paid for the ongoing expenses of the litigation so that Virani would not have to, and paid a contingency fee to HP which, had TAF not paid, Virani would have paid. (SER Tab 228; SER Tab 134, at 33; SER Tab 225, at 211-14).

Lewis falsely implies that John Phillips misled the district court during the initial hearing on HP's motion for attorneys' fees when he stated that "Virani fully understood . . . and supports the fee arrangements." (*See* Lew. Pet., at 11). In fact, John Phillips' statements were true. Virani fully understood the arrangements, both from the fee agreements themselves, and from HP's explicit letters explaining them. (*See* citations above). It was not until HP's services were completed in the case and Virani saw an opportunity to extort money from his attorneys that he first asserted his lack of support for the fee arrangements. (SER Tab 225, at 206-08).

Both the district court (on two separate occasions) and the Court of Appeals have sorted through Lewis' many unfounded allegations and determined the reasonableness of the award of fees to HP. There is no justification for revisiting Lewis' allegations.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 21, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56396

D.C. No. CV-89-01302-WDK-Ex

UNITED STATES OF AMERICA ex rel. ALNOOR VIRANI,

Plaintiff-Appellee,

v.

JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC.; STEVEN LEWIS; ROBERT HOLTZMAN,

Defendants,

and

HALL & PHILLIPS,

Appellants.

No. 95-56456

D.C. No. CV-89-01302-WDK-Ex

UNITED STATES OF AMERICA, ex rel. ALNOOR VIRANI,

Plaintiff-Appellee,

Appendix A

v.

STEVEN H. LEWIS; JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC.; ROBERT HOLTZMAN,

Defendants-Appellants.

ORDER DENYING PETITIONS FOR REHEARING, REJECTING SUGGESTION FOR REHEARING EN BANC, AND DENYING MOTION TO CONSOLIDATE

Before: FARRIS, FERNANDEZ, and THOMAS, Circuit Judges.

The petition of defendants-appellants for rehearing is DENIED.

The panel has unanimously voted to deny the appellee's petition for rehearing. The suggestion for rehearing en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration. The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Appellee's motion to consolidate this case with *United States of America ex rel. Taxpayers Against Fraud v. Kirchoff*, No. 94-56482, is DENIED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 9, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56396

D.C. No. CV-89-01302-WDK-Ex

UNITED STATES OF AMERICA ex rel. ALNOOR VIRANI,

Plaintiff-Appellee,

v.

JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC.; STEVEN LEWIS; ROBERT HOLTZMAN,

Defendants,

and

HALL & PHILLIPS,

Appellants.

No. 95-56456

D.C. No. CV-89-01302-WDK-Ex

Appendix B

UNITED STATES OF AMERICA, ex rel. ALNOOR VIRANI,

Plaintiff-Appellee,

v.

STEVEN H. LEWIS; JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC.; ROBERT HOLTZMAN,

Defendants-Appellants.

ORDER DENYING MOTION TO STAY ISSUANCE OF MANDATE

Before: FERNANDEZ, Circuit Judges.

The motion of defendants-appellants to stay issuance of mandate pending petition to Supreme Court for writ of certiorari is DENIED.